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A P P E A R A N C E S

Page

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E X H I B I T S

<u>NUMBER</u>		<u>MARKED FOR IDENTIFICATION</u>
21	Approved Schematic Development Plan	14
22	County Council Resolutions 16-233, 16-234 and 16-235 dated 7/3/07	23
23	Kaz Development Acknowledgment of termination of contracted dated 10/5/09	27
24	Perry Berman Resume	29

1 P R O C E E D I N G S

2 MR. GROSSMAN: This is a show cause hearing for
3 Kaz Development, LLC, No. G-858-SC. The subject property
4 consists of 2.58 acres of land located at 10500 Georgia
5 Avenue and described as Lots 1 to 9, Block C, Lot 18, Block
6 HH and portions of adjacent rights of way abandoned by the
7 state and county, all in the Carroll Knoll Subdivision. It
8 was rezoned from the R-60 zone to the RT-12.5 zone by action
9 of the District Council on September 11, 2007
10 (indiscernible) No. 16-290.

11 In connection with this rezoning, binding elements
12 were included in the schematic development plan approved by
13 the District Council. These binding elements specify a
14 townhouse use for the property. Those binding elements have
15 allegedly been breached or are incapable of being carried
16 out.

17 My name is Martin Grossman, I'm the hearing
18 examiner, which means I will take evidence and write a
19 report and recommendation to the County Council, sitting as
20 District Council, which will take final action on the show
21 cause issue. Will the parties identify themselves for the
22 record, please.

23 MR. KLINE: Good morning, my name is Jody Kline,
24 I'm an attorney with the law firm of Miller, Miller & Camby,
25 with offices at 200B Monroe Street, here in Rockville,

1 Maryland. I represent the Montgomery College Foundation,
2 who is the complainant as it were in this case. And, as
3 part of our presentation, we would call two witnesses, Mr.
4 Ken Becker, B-E-C-K-E-R, and Mr. Perry Berman. And I would
5 imagine our presentation would be less than an hour.

6 MR. GROSSMAN: All right. Ms. Scala-Demby.

7 MS. SCALA-DEMBY: I am Susan Scala-Demby. I am
8 the zoning manager for the Department of Permitting
9 Services.

10 MR. GROSSMAN: I see two gentlemen in the
11 audience. I take it that those are your two witnesses?

12 MR. KLINE: Mr. Becker and Mr. Berman.

13 MR. GROSSMAN: And, seeing no other witnesses
14 here, I won't usually ask the question that anybody in the
15 audience who wishes to be heard here, but I see no other
16 witnesses or participants in the audience. Preliminary
17 matters. This type of proceeding has never been held before
18 in this jurisdiction as far as I know, and based on the
19 investigation by the Department of Permitting Services as
20 indicated in Exhibit 1 in the file, and pursuant to Zoning
21 Ordinance Section 59-H-2.53(I) the hearing examiner issued a
22 notice on February 28, 2011 directing the rezoning
23 applicant, Kaz Development LLC and the landowner, Montgomery
24 College Foundation, to show cause whether there is non-
25 compliance with the binding elements of the schematic

1 development plan approved by district council, and whether
2 it merits sanctions, including revision to the previous
3 zoning category. The show cause notice established a
4 process for the hearing, it set it out in the show cause
5 notice. The first step of that is that the hearing examiner
6 will take official notice of the file in G-858, which gave
7 rise to the zoning, and unless I hear an objection, I hereby
8 do so. I'll take official notice of the entire record in G-
9 858.

10 MR. KLINE: The Foundation has no objection.

11 MR. GROSSMAN: The next step in the process would
12 be my asking Ms. Scala-Demby to present evidence regarding
13 the alleged non-compliance. After that, Montgomery College
14 Foundation and if anybody from Kaz Development were here,
15 they'd be given the opportunity also to present their
16 evidence and any other party who wished to speak about it,
17 and then rebuttal, if any, and then closing argument.
18 That's the way we set out the process. Are there any other
19 preliminary matters?

20 MR. KLINE: No sir, Mr. Grossman, and I was going
21 to other than to thank you for having sent out a very
22 detailed notice because I'm not sure I would have known how
23 to proceed but for your guidance.

24 MR. GROSSMAN: We're breaking new ground, all of
25 us together. A historic moment they like to say in

1 Congress. Okay, so the next step in the process then would
2 be that I would call Susan Scala-Demby to testify.

3 (Witness sworn.)

4 DIRECT EXAMINATION

5 MR. GROSSMAN: And, would you identify yourself
6 again please.

7 THE WITNESS: Susan Scala-Demby, Zoning Manager
8 for the Department of Permitting Services.

9 MR. GROSSMAN: And, you had occasion on February 8
10 to send a letter, which has become Exhibit 1 in this case.
11 Is this a copy of your letter, Ms. Scala-Demby?

12 THE WITNESS: Yes, it is.

13 MR. GROSSMAN: And that's Exhibit 1 in the case.
14 There were attachments, I believe, or if not they have been
15 later supplied, Exhibit 1(a) is a letter to you from Jody
16 Kline, is that correct? And that's a letter dated December
17 15, 2010?

18 THE WITNESS: Yes.

19 MR. GROSSMAN: And that's Exhibit 1(a) here. Is
20 that the reason you began your investigation?

21 THE WITNESS: Yes.

22 MR. KLINE: Mr. Grossman, may I ask you a
23 question?

24 MR. GROSSMAN: Yes.

25 MR. KLINE: Looking at the exhibit list, No. 1 on

1 the exhibit list, it says 2/18/2011, and I'm, if it's
2 referring to the date of Ms. Scala-Demby's letter, then
3 there's a typo. If it's referring to when this was logged
4 into your file or something --

5 MR. GROSSMAN: Yeah, I think that's what it was
6 referring to, but we'll correct it on there to make sure
7 that that's clear. The letter is actually a letter of
8 2/8/11.

9 MR. KLINE: Thank you.

10 MR. GROSSMAN: And it appears the remainder of the
11 exhibits also received at that time, are logged in as
12 2/28/11, even though the declaration of covenants obviously
13 is an earlier date and so on. And, we can clarify that
14 later on. The aerial photo of the site, Exhibit 3, was that
15 supplied by you, Mr. Kline?

16 MR. KLINE: Yes. It was an attachment to my
17 letter to Ms. Scala-Demby.

18 MR. GROSSMAN: And did you also supply her with
19 the declaration of covenants?

20 MR. KLINE: Yes, sir.

21 MR. GROSSMAN: Exhibit 2, Declaration of
22 Covenants, is this a copy of the Declaration of Covenants
23 that you received regarding this case from Mr. Kline?

24 THE WITNESS: Yes.

25 MR. GROSSMAN: And, Exhibit 3, an aerial photo

1 that he attached of the subject site?

2 THE WITNESS: Yes.

3 MR. GROSSMAN: And, Exhibit 4(a), the order from
4 the circuit court dated, while entered February 6, 2008 and
5 then 4(b) the Maryland Court of Special Appeals Opinion,
6 were these also documents you received from Mr. Kline?

7 THE WITNESS: Yes.

8 MR. GROSSMAN: All right. And, let's see, did Mr.
9 Kline also supply you with a copy of the council's
10 resolution 16-290, Exhibit 5 in this case?

11 THE WITNESS: Yes.

12 MR. GROSSMAN: All right. What, if anything, did
13 you do with this having received Mr. Kline's letter and its
14 attachments?

15 THE WITNESS: I obviously looked through and read
16 everything that he had given me. I spoke with our attorney
17 as well, just for some clarity in determining that there was
18 a legal impossibility to implement the approved site
19 development plan.

20 MR. GROSSMAN: And, why is that?

21 THE WITNESS: Well, the Court of Special Appeals
22 reversed a ruling of the circuit court and declared the 1948
23 covenant that restricts the use of lots within the Carroll
24 Knolls Community to be still valid and enforceable. So --

25 MR. GROSSMAN: And what do the special covenants,

1 that the private covenants require it to be there or
2 prohibit to be?

3 THE WITNESS: Well, what it turned out, what was
4 agreed upon, I guess, originally was three story townhouses.
5 And then other amenities, I guess, in the whole site
6 development. That was never implemented and it was taken to
7 court and the developer, I guess, was part of this case and
8 did not prevail in that hearing.

9 MR. GROSSMAN: Right, well actually prevailed in
10 the circuit court but it was reversed by the Court of
11 Special Appeals. But what is the, when you say did not
12 prevail, there were private covenants that existed in the
13 community, is that correct? That covered this area, is that
14 correct?

15 THE WITNESS: Yes.

16 MR. GROSSMAN: And what did those private
17 covenants provide that have had an effect on this case?

18 THE WITNESS: I'm not sure that I remember all of
19 them, to be honest.

20 MR. KLINE: May I? I have the text if I can
21 provide. This is the text of the covenants, the binding.

22 THE WITNESS: The covenants, there were 377
23 properties that were intended to be in or were in separate
24 private ownership. All of the lots were to be used as
25 residential lots. No structure could remain on any

1 residential building plat other than one detached single
2 family dwelling as per the Zoning Ordinance, not to exceed
3 two and a half stories in height, and a private garage for
4 not more than two cars and other out buildings, you know, a
5 shed or whatever.

6 MR. GROSSMAN: Okay, so those are the private
7 covenants that ultimately were found to be enforceable by
8 the Court of Special Appeals?

9 THE WITNESS: Yes.

10 MR. GROSSMAN: And so what is your conclusion as a
11 result of that, those covenants being upheld and what did
12 you do as a result?

13 THE WITNESS: As a result of that I determined
14 that this development plan was not valid.

15 MR. GROSSMAN: By this development plan you mean
16 the one that was approved by the council in the rezoning?

17 THE WITNESS: Yes. And that it had to revert back
18 to the zoning in effect back in 1948.

19 MR. GROSSMAN: The R-60 zone?

20 THE WITNESS: The R-60.

21 MR. GROSSMAN: I take it that that's not the only
22 possible remedy. Are there other remedies that could occur
23 here other than reverting to the original zone, or is that
24 the one you recommend? How do you analyze this?

25 THE WITNESS: I did not look at other zoning that

1 could take place as opposed to the R-60.

2 MR. GROSSMAN: Well, I'm saying anything, is there
3 anything short of reverting back to the R-60 zone that could
4 be a remedy for this situation? I'm not saying in another
5 zone, because that would require a whole new zoning process.
6 Because the council has a choice under the statute, council
7 can allow it to revert back to the original zone, that's
8 what they consider a sanction, I guess, or they can
9 presumably do something else. I don't know what that
10 something else is, it's not specified in the statute. Do
11 you have any ideas that you wish to contribute here?

12 THE WITNESS: I really don't. I don't know that I
13 have something.

14 MR. GROSSMAN: All right. So DPS recommends
15 reversion back to the R-60 zone as the remedy?

16 THE WITNESS: Yes.

17 MR. GROSSMAN: All right. Okay, is there anything
18 else you wanted to add?

19 THE WITNESS: I don't think so, no.

20 MR. GROSSMAN: All right. Cross-examination?

21 MR. KLINE: No questions of Ms. Scala-Demby.

22 MR. GROSSMAN: Thank you. Is there any reason why
23 we need to keep Ms. Scala-Demby here if she needs to leave?
24 I know she's on her vacation.

25 THE WITNESS: I can stay a little bit if you need

1 me to be here.

2 MR. KLINE: There's nothing that I would be
3 saying. I would think it'd only be if you need her for the
4 resource. So I don't think she needs to remain, sir.

5 MR. GROSSMAN: Were there any other documents that
6 you received regarding this matter, Ms. Scala-Demby?

7 THE WITNESS: The only documents I received this
8 morning were resolutions by the council that Mr. Kline gave
9 me, some of which I already had.

10 MR. GROSSMAN: Resolutions pertaining to what?

11 THE WITNESS: Abandonment.

12 MR. KLINE: Abandonment of adjacent public
13 streets.

14 MR. GROSSMAN: Okay. But you didn't have those
15 previously?

16 THE WITNESS: No.

17 MR. GROSSMAN: So there were no other documents
18 that you received that served as the basis for your
19 recommendation here?

20 THE WITNESS: No.

21 MR. GROSSMAN: And for your investigation. Okay.
22 All right, then I don't know that there's any other reason
23 to keep you here. I should note that we did receive a, and
24 I distributed, a copy of a, I received a letter from
25 technical staff indicating that Rose Krasnow, and that's

1 Exhibit 20 in this case, indicating that the property cannot
2 be developed in accordance with the development plan and
3 that she sees no other remedy than it reverting back to the
4 R-60 zone. Do we have a copy, by the way, of the private
5 covenants themselves, Mr. Kline?

6 MR. KLINE: The 1948 covenants?

7 MR. GROSSMAN: Right.

8 MR. KLINE: No, I didn't see them attached to a
9 document. I certainly have them in my files in my office.

10 MR. GROSSMAN: All right. I think maybe to
11 complete this record that we should have a copy of those
12 covenants in this record.

13 MR. KLINE: Yes, sir. I'll be able to get that
14 for you this afternoon.

15 MR. GROSSMAN: All right, then if there's nothing
16 further of Ms. Scala-Demby, I think we can release her. I
17 appreciate you coming in on your vacation. Thank you very
18 much.

19 All right, Mr. Kline, did you have an opening
20 statement you wish to make?

21 MR. KLINE: Not really, Mr. Grossman. I guess,
22 no. You actually pretty well captured everything in your
23 opening remarks and your notice as well. And from what you
24 got from Susan. And the fact that you had handled the
25 original zoning case and then you're intimately familiar, so

1 it's kind of my job to tell you what happened after it left
2 your office. I did bring with me though a copy of the
3 certified schematic development plan. I realize you've
4 incorporated the record of 858 into this file, but that
5 doesn't necessarily bring all the documents and I thought it
6 would be good to have a copy of this. So I'd suggest this
7 be made an exhibit in the record of the case.

8 MR. GROSSMAN: That would be Exhibit 21. And that
9 is the approved schematic development plan, SDP.

10 (Exhibit No. 21 was marked for
11 identification.)

12 MR. KLINE: Signed by Martin L. Grossman on
13 September 28, 2007.

14 MR. GROSSMAN: Well, that's my certification that
15 that's a true copy. That's not an approval of it. The
16 council actually approves it.

17 MR. KLINE: Yes, exactly right.

18 MR. GROSSMAN: That's approved, SDP approved by
19 Resolution 16-290 on 9/11/07. Can you note on there Exhibit
20 21.

21 MR. KLINE: I did. I put it in the upper right
22 hand corner.

23 MR. GROSSMAN: All right, and you wish to call a
24 witness?

25 MR. KLINE: And, Mr. Grossman, just for me this is

1 somewhat of a what I'll call a paper case, and you've
2 already anticipated much of what I was going to give you and
3 the documents that you asked Ms. Scala-Demby about. I will
4 have only one additional document, and I'm sorry I didn't
5 give it to you earlier, in my preparation yesterday I
6 realized I'd overlooked it, but I'll provide that to you.
7 But I would like to start by calling my first witness to
8 kind of give you an overview of how we got to this point.

9 MR. GROSSMAN: All right.

10 BY MR. KLINE:

11 Q Mr. Becker, would you please state and spell your
12 name and give us your business address.

13 A My name is Kenneth Becker. That's K-E-N-N-E-T-H.
14 Becker is B-E-C-K-E-R. My business address as a private
15 individual is care of Rakusin & Becker Management, 4400
16 East/West Highway, Suite H, Bethesda, Maryland 20816.
17 However, I am speaking on behalf of Montgomery College
18 Foundation, the owner of the subject parcel. I was
19 appointed to the Board of Directors --

20 MR. GROSSMAN: Let me stop you for a second.
21 Would you raise your right hand, please.

22 (Witness sworn.)

23 THE WITNESS: I was appointed to the Board of
24 Directors of the Montgomery College Foundation in June 2005
25 and have been reappointed at the end of each successive term

1 since that time. I also serve on the boards of
2 entrepreneurial and real estate projects committee, and in
3 that capacity have been tasked with representing the
4 Foundation concerning this matter.

5 BY MR. KLINE:

6 Q Would you please explain how the College
7 Foundation became owner of the subject property?

8 A Did you want me to explain what the Foundation was
9 at all or just go straight to?

10 Q Well, yeah, why don't you give, because it does
11 relate to ultimately what the solution we're recommending.
12 So yes, why does the Foundation exist?

13 A The Montgomery College Foundation was established
14 in 1982 as a 501(c)(3) charitable organization. It's
15 governed by a 21 member board of directors made up of
16 business alumni and community leaders to enhance and support
17 the mission of the Montgomery College. This mission
18 includes ongoing financial support for the physical
19 infrastructure of the college's three campuses, and perhaps
20 most importantly, fundraising in support of scholarship aid
21 for Montgomery College students for which there continues to
22 be a crushing demand in excess of resources.

23 In terms of how the Foundation came to be involved
24 in this particular piece of property, for various reasons
25 Montgomery College assumed operational control of the

1 Maryland College of Art and Design in the early 2000's and
2 completed a plan transfer of that institution's activities
3 and converted them over to the Montgomery College Takoma
4 Park Campus in 2004. At that time the land and building was
5 also conveyed to Montgomery College which was subsequently
6 assigned by Montgomery College to the Montgomery College
7 Foundation for disposition and administration of proceeds
8 for the benefit of the college. The Foundation's goal, and
9 indeed its fiduciary responsibility throughout this process
10 has been to maximize the value of this asset and dispose of
11 it.

12 Q And you use the term assign, the Foundation is
13 actually the record owner or title owner of the property?

14 A Yes, it is.

15 Q I had forwarded to you some of the correspondence
16 from Mr. Grossman's office dealing with the question of
17 what's Kaz's relationship originally as the applicant. What
18 is Kaz's legal interest in the property today?

19 A Kaz was a contract owner. The Foundation entered
20 into a contingent contract of sale --

21 MR. GROSSMAN: Contract owner? They were contract
22 developer or contract --

23 THE WITNESS: Meaning they had a contract to
24 purchase the land. So as a term of art in the development
25 business we call that a contract owner.

1 MR. GROSSMAN: Okay.

2 THE WITNESS: But they had not taken title to it.
3 They simply had the rights in anticipation of taking title
4 to proceed with attempting to process it for the appropriate
5 approvals for development.

6 MR. GROSSMAN: Okay. And, were there
7 contingencies in that contract?

8 THE WITNESS: Yes. The contingencies under the
9 contract included, amongst others, the ability to develop
10 the property at a density equal to support the purchase
11 price that they were willing to pay. And in that instance
12 it was for a townhouse development which was anticipated to
13 be the highest and best use at that point in time.

14 MR. GROSSMAN: And was that contingency ever
15 satisfied?

16 THE WITNESS: The zoning was approved, but all of
17 the processes, including the litigation under the land use
18 covenant were ultimately were not, and that contingency
19 therefore was never fully satisfied and gave Kaz the
20 opportunity to terminate their rights under the purchase of
21 that property as of September 30, 2009.

22 MR. GROSSMAN: I take it then there's no dispute
23 between the Foundation and Kaz as to their right to
24 terminate their relationship?

25 THE WITNESS: No. There was no dispute. Nobody

1 was happy, but there was no dispute and Kaz did terminate
2 and release from any further obligation under the contract.
3 And that was a mutual release.

4 MR. GROSSMAN: Was there a document that
5 demonstrated that?

6 THE WITNESS: Yes, there was. I don't have that
7 in my possession today, but we can get that for you.

8 MR. GROSSMAN: Okay. I should mention in
9 connection with that that, of course I sent the show cause
10 notice to Kaz Brothers or Kaz Development LLC, I think was
11 the name of it, and not having received any written
12 response, I subpoenaed their chief operating officer who had
13 been a signatory to the covenants. He then responded and
14 asked to be released in a little letter, which is now in the
15 record. This is letter of June 10, 2011. Let me just make
16 sure that that's the correct date. Okay, yes a letter of
17 June 10, 2011 to me indicating that the development company
18 no longer had an interest, as you've testified, in the land,
19 and he asked to be released from the subpoena, and I
20 ultimately did so since he indicated that they had no
21 interest in it. But I think it would be a good idea for
22 this record to have a copy of the actual release so
23 indicating.

24 MR. KLINE: At the conclusion of the hearing
25 today, if you'll leave the record open for a short period of

1 time, we'll get it to you immediately.

2 MR. GROSSMAN: I'll leave it open for 10 days in
3 any event to get the transcript.

4 MR. KLINE: Okay.

5 BY MR. KLINE:

6 Q Mr. Becker, were you finished with your comments
7 or are you ready for my next question?

8 A I'm ready for your next question.

9 Q Well, it is still then the Foundation's goal to
10 dispose of the property albeit in a different form now?

11 A Yes. Following this contract termination, the
12 Foundation board again sought to renew its disposition
13 efforts. But following discussions with its designated land
14 broker, it's engineering consultants and counsel, determined
15 the full extent of this land use conflict that had developed
16 where the approved zoning and binding elements of that
17 zoning were in fact prohibited following the court
18 validation of the previously unenforced land use covenant.

19 And it was with those facts in mind, and as
20 counsel advised us of the various options under the zoning
21 ordinance, that a determination was made to advise DPS of
22 the Foundation's inability to comply with the terms of the
23 zoning of the subject site, including all the binding
24 elements under the approved plan, thus remaining in non-
25 compliance with all such requirements without the

1 possibility of compliance.

2 Q So the limbo that we're in, not to use that legal
3 term, has inhibited your ability to market the property and
4 actually get an offer to buy the property?

5 A That's correct. As the board member tasked with
6 this effort, I was immediately confronted with the fact that
7 there was great difficulty in determining value because
8 there was great difficulty in determining what can be done
9 with this land in this very muddled state of approvable
10 uses.

11 Q So the initiation of this process that brought us
12 here today was with the goal of having the zoning reverted
13 to the R-60, because that would clear up the issues
14 associated with the marketing of the property?

15 A We see that as the only alternative under the
16 circumstance that unfortunately because of the accident of
17 subsequent activities and rulings that this land simply
18 cannot be developed pursuant to the townhouse RT-12.5 zoning
19 that was approved with all those binding elements.

20 MR. KLINE: Mr. Grossman, I have no further
21 questions of Mr. Becker at this point in time. I do have
22 some graphic material I'd like to provide you, and I think
23 I'll just leave it in here as a witness, but I'm available
24 to answer any questions because I'm almost going to get to
25 the point where I'm testifying.

1 What I'd like to do is probably give you a bundle
2 of materials that --

3 MR. GROSSMAN: Mr. Becker, I take it then that the
4 Foundation's position is that you can't comply with the
5 binding elements and you would seek to have the zoning
6 reverted back to the R-60 zone, that's your bottom line?

7 THE WITNESS: Yes, that is our position.

8 MR. GROSSMAN: Okay.

9 MR. KLINE: Mr. Grossman, again, this is a bundle
10 of material, much of which you have already referenced in
11 Exhibits 1 through 4. However, there are three individual
12 sheets of paper on the top and these are organized in
13 chronological fashion, and the three items on the top are
14 resolutions of the County Council abandoning streets, which
15 on the schematic development plan, Exhibit No. 21, about the
16 subject property and were incorporated within the limits of
17 the area that was rezoned to the RT-12.5. And what I'd like
18 to do is draw your attention --

19 MR. GROSSMAN: There was also a state abandonment,
20 right?

21 MR. KLINE: Yes. Down in the lower right hand
22 corner, a little notch along George Avenue and Evans Drive.

23 MR. GROSSMAN: And that also was done, the
24 abandonment went through from the state?

25 MR. KLINE: That I don't have an answer to that.

1 Mr. Becker?

2 MR. BECKER: I don't believe it did. And even the
3 other abandonments, which were approved, were never
4 ratified.

5 MR. KLINE: That's what I'm going to come back to.

6 MR. GROSSMAN: Okay. Shall we mark, since we have
7 the remainder of the exhibits already, shall we just mark
8 these top three in the package?

9 MR. KLINE: That's fine. I'm fine with that, yes,
10 sir.

11 MR. GROSSMAN: So that will be Exhibit 22 (a), (b)
12 and (c) are County Council Resolutions 16-233, 16-234 and
13 16-235, will be (a), (b) and (c). All dated July 3, 2007.

14 (Exhibit No. 22 was marked for
15 identification.)

16 MR. GROSSMAN: And these, they all approve the
17 abandonments that were requested?

18 MR. KLINE: Of the adjacent streets, yes, sir.
19 Evans, Douglas and Gardiner.

20 MR. GROSSMAN: All right.

21 MR. KLINE: And, if I could draw your attention,
22 in each of the resolutions there's a paragraph two on page 2
23 of the resolutions, --

24 MR. GROSSMAN: On page?

25 MR. KLINE: On page 2 in a similar, an identical

1 paragraph No. 2, which basically says the abandonment shall
2 not become effective until within 24 months after the date
3 of the abandonment, a new record plat of abandonment is
4 recorded and assembly that'll land into the townhouse
5 community, and to obtain a preliminary plan (indiscernible)
6 for which the abandonments are associated. And, I wish to
7 proffer that those steps have never been taken.

8 MR. GROSSMAN: Okay. Is this something that we
9 can put, that you're proffering. Do you have a witness who
10 can testify to that? That these steps have never been
11 taken?

12 MR. KLINE: Mr. Berman in his expertise as the
13 broker of the property has verified that information. I can
14 have him verify that.

15 MR. GROSSMAN: All right. Let's have that as
16 evidence in the case.

17 MR. KLINE: Sure. The deep background is, is when
18 the appeal to the Court of Special Appeals occurred, Kaz
19 Brothers basically turned to Foundation and said, look,
20 we've had enough of this. You go clean it up and when you
21 clean it all up, bring it back to us. And from that point
22 on they were no longer involved. So there was never any
23 engineering of the steps to implement the rezoning took
24 place. But we can give you testimony to that effect.

25 MR. GROSSMAN: All right. Well the idea is that,

1 what you're saying is that these abandonments, even though
2 approved by the council, did not become effective.

3 MR. KLINE: They have, in my opinion, they've
4 expired because the preliminary plan at subdivision was not
5 recorded within 24 months.

6 MR. GROSSMAN: So what's the remedy for that?

7 MR. KLINE: It'd have to go back through the
8 abandonment process again. I have had that happen before.
9 You have to go back and sort of redo the abandonment to keep
10 it in place.

11 MR. GROSSMAN: So are you saying that your client
12 wants to keep the abandonment in place or does not want to
13 keep the abandonment?

14 MR. KLINE: No, the abandonments were only
15 essential to the implementation of the schematic development
16 plan. What we want to do is go back to the original lot
17 configuration and just develop the lots in accordance with
18 the way they're platted today.

19 MR. GROSSMAN: So I guess what I'm asking is,
20 since you said that these abandonment resolutions have now
21 expired and did not go into effect, is that the end of the
22 story with regard to them, or do they have to be cleared up
23 on the record in some way in front of the council?

24 MR. KLINE: Nothing needs to be done with those at
25 all. It happens automatically by virtue of the condition,

1 and it's not essential to the implementation of a scheme to
2 develop the property with 10 single family dwelling units.
3 I bring it up only as part of the impossibility of
4 performance to implement the schematic development.

5 MR. GROSSMAN: And I raise my question just to see
6 if there was something, for example, of these in any way
7 filed in the land records, these abandonments.

8 MR. KLINE: DOT may have done that. I don't know
9 that to be a fact. I would have thought probably not
10 though.

11 MR. GROSSMAN: Because if, I mean, it's probably
12 something you ought to check because you may have to go
13 back, I mean I don't think it has to be part of this process
14 necessarily, because as you say the time period has run, but
15 it may be something you'll want to clear up on the land
16 records.

17 MR. KLINE: It's a good point. I'm sure that any
18 buyer will want to make sure that that's not an issue. I
19 think that really covers everything from the paper point of
20 view in terms of what I want to provide you. You've got
21 everything else. Unless you have any questions of Mr.
22 Becker, I'll just finish here and then ask Mr. Berman to
23 come up.

24 MR. GROSSMAN: Okay, I'm finished with Mr. Becker,
25 thank you.

1 MR. BECKER: I'd like to amend what I said
2 briefly. I was going through my file and found what Kaz has
3 provided us in the way of contract termination. I had
4 indicated before that it was a release. It is not. It's
5 simply an acknowledgment of the termination of the contract.

6 MR. GROSSMAN: All right. There's nothing
7 corresponding. This is signed, well let's call it Exhibit
8 23, and that is Kaz 10/5/09 acknowledgment of termination of
9 contract.

10 (Exhibit No 23 was marked for
11 identification.)

12 MR. GROSSMAN: So this document is signed only by
13 Victor Kazangian as Manager of Kaz Development LLC and
14 indicates that he acknowledges termination of the real
15 estate sales contract which you referenced earlier. And, is
16 there any other document signed by the Foundation that
17 agrees to this abandonment of the contract, or is this the
18 only document?

19 MR. BECKER: I believe it's the only document.
20 I'd have to refer to our transactional counsel to confirm
21 that, but I believe that the opinion at that time was that
22 that was all we needed.

23 MR. GROSSMAN: Okay. I mean, I think it's
24 sufficient for our purposes. I just, if some other document
25 in that regard exists, I just thought it could be filed as

1 part of the record, but if not, I think it'll be sufficient
2 to show that it was based on your testimony also that the
3 Foundation does not dispute the termination of the contract,
4 I don't see where that's an issue. Thank you, Mr. Becker.
5 I don't know that we should let you get through this case
6 this fast, Mr. Kline. I think maybe we'd have to keep Mr.
7 Berman on the stand for a few hours at least.

8 MR. KLINE: I promised the young lady over here
9 that she could go home early today.

10 MR. GROSSMAN: Can you state full name and work
11 address, please.

12 MR. BERMAN: My name is Perry Berman. P-E-R-R-Y,
13 Berman, B-E-R-M-A-N. And I work with Scheer Partners at
14 9713 Key West Avenue, Gaithersburg, Maryland. With them I
15 am a commercial real estate agent.

16 (Witness sworn.)

17 MR. GROSSMAN: You may proceed, Mr. Kline.

18 DIRECT EXAMINATION

19 BY MR. KLINE:

20 Q Mr. Berman, did you bring a copy of your resume
21 with you?

22 A Yes, I sure did.

23 Q I'll just give it to Mr. Grossman.

24 MR. KLINE: Mr. Grossman, Mr. Berman, you may have
25 had the pleasure of having him before you before, but I'd

1 ask that his resume be made an exhibit in the record.

2 MR. GROSSMAN: Perry Berman resume, and that'll be
3 Exhibit 24.

4 (Exhibit No. 24 was marked for
5 identification.)

6 MR. GROSSMAN: Are you calling Mr. Berman as an
7 expert?

8 MR. KLINE: I'm not, because I wasn't quite sure
9 what, he has multiple expert designations, and I wasn't
10 quite sure one, that we needed it, and two, what we'd
11 qualify him as. So if you get to a point where you think
12 Mr. Kline it would be helpful to the record or the case, I
13 would go back and do that. But I think right now just used
14 as straight information.

15 BY MR. KLINE:

16 Q Mr. Berman, were you engaged by the Foundation to
17 market and sell the subject property?

18 A Yes, I was. I was contacted by the Foundation and
19 asked to submit a proposal to market their property, and
20 with my expertise and planning issues around the site and my
21 previous experience on the site, they were good enough to
22 retain me in March of 2010.

23 Q And in your initial inquiries in the marketplace,
24 what kind of a reaction did you receive from perspective
25 purchasers when you explained the situation of the property?

1 A They were exceptionally confused by the, between
2 the conflict between the covenant and the zoning, and they
3 were not --

4 MR. GROSSMAN: Between the private covenants and
5 the public -- we have two sets of covenants here. I take it
6 that you were not involved in this prior to March of 2010?

7 THE WITNESS: I was. I was the agent for the NBR
8 when they sold the property to the Kaz Brothers. Or they
9 entered, NBR found the property. I was working for NBR as
10 an agent.

11 MR. GROSSMAN: NBR stands for?

12 THE WITNESS: NBR Ryan Homes. You know it is a
13 Ryan Homes. And Ryan Homes had retained me to find a
14 property for them in Montgomery County. I found the
15 Foundation site. NBR then found the Kaz Brothers.

16 BY MR. KLINE:

17 Q And NBR put in a contract in with the Foundation?

18 A It was a Kaz Brothers contract, but NBR was the
19 selected builder of that. And so I was the agent at that
20 time for, and but once that contract was signed between the
21 Kaz Brothers and the Foundation, I was out of any of the
22 other proceedings. So my involvement stopped in 2004/2005.

23 MR. GROSSMAN: Okay. Then you became reinvolved
24 in March of 2010 when you were engaged to try to market the
25 property?

1 THE WITNESS: That's correct.

2 BY MR. KLINE:

3 Q And can you characterize what their concern is and
4 the issues they're wrestling with?

5 A Well, I talked to a variety of builders and
6 developers, all with extensive experience in Montgomery
7 County. None of them had ever seen this kind of conflict
8 before. None of them were interested in trying to resolve
9 it. None of them knew how to resolve it. And they all felt
10 it was extremely valuable property. They were all very
11 interested. If we ever cleared it up, they would be very
12 interested in proceeding. But given the problems, they were
13 uninterested.

14 Q In your preparation for marketing the property,
15 did you have an opportunity to determine the status of the
16 abandonment resolutions, whether the steps to implement it
17 verify that had ever been taken place?

18 A Yeah. I looked at that. I talked to the
19 engineers involved, and my conclusion is that they just
20 stopped the process and nothing was actually implemented.
21 They just, I've seen that happen in other disputes where
22 things get to a point and they just drop.

23 Q So no preliminary plan of subdivision
24 incorporating the abandoned right of way into a new 27 lot
25 layout has ever occurred?

1 A Ever occurred. That's correct, sir.

2 Q Mr. Berman, I want to change focus a little bit,
3 and would you explain to Mr. Grossman your experience with
4 the Park and Planning Commission, and your familiarity with
5 the Zoning Ordinance.

6 A For over 25 years I worked at Park and Planning
7 Commission. My last official title was Chief of Community
8 Planning and I was involved in all the master plans that
9 were done in Montgomery County. For 20 years I actually was
10 the supervising planner for the Kensington/Wheaton Master
11 Plan, and under all those various issues I reviewed many
12 zoning cases, subdivision cases, was involved in many, many
13 technical staff reports and most of the time I was given the
14 responsibility of someone resolving some of the more complex
15 problems that would come development issues in Montgomery
16 County.

17 Q And you today still act as a land use consultant
18 for various property owners dealing with Park and Planning?

19 A Yes.

20 Q And interpreting the Zoning Ordinance?

21 A That's correct. I retained Berman Ventures, which
22 is my planning hat, and I represent properties in a variety
23 of planning issues for the county and on, a whole variety of
24 issues.

25 Q Mr. Berman, I forwarded to you a number of e-mails

1 that the hearing examiner's office generated, and you can
2 see the hearing examiner is saying, is there any other way
3 to skin this cat? Is there any other solution other than
4 reversion, which is a fairly dramatic if not unique process.

5 And based on your experience with the Zoning Ordinance, do
6 you see any other way to clear up this confusion?

7 A I am actually, we've never seen it. Excuse me,
8 I'm putting on my Park and Planning Commission, a former
9 hat, and when I say we, I'm sorry, as a Park and Planning
10 Commission employee over the 28 years I was there, I've
11 never seen anything like this. I've never seen it and I
12 never would have known how to solve this problem unless we
13 found this show cause issue.

14 Jody gets all the credit for that. I think it's
15 none of the developers, none of the zoning attorneys, no one
16 that I talked to, even at Park and Planning Commission, when
17 I was retained by the Foundation, I went over to the Park
18 and Planning Commission staff informally, and said well, how
19 do I resolve this conflict? And I talked to some of the old
20 folks that have been there for a while, and they had no way
21 around that. And again, it's a valuable piece of property.

22 So a lot of people have looked at it and have not come up
23 with any other solution.

24 MR. GROSSMAN: So Jody gets the blame.

25 MR. KLINE: Yeah, right. Well, he gets the blame

1 because he put it in the R-60 classification originally.
2 Mr. Grossman, that does complete our presentation. I do
3 want to try and draw it all together in a closing argument,
4 but everyone's available if you have any questions.

5 MR. GROSSMAN: Your bottom line, Mr. Berman, is
6 that, you said this is a unique problem. I'm not sure you
7 fully answered the question of whether or not there's any
8 other solution other than reverting back. I mean we have
9 the process now, which is unique as far as we know, but in
10 terms of the solution and the statute says that it can come
11 back, it can be revert, revert back to the original zone or
12 there may be other sanctions. And so that's the question,
13 is there any other remedy that is available and, if so, is
14 reversion to the R-60 zone the one you would think is most
15 appropriate?

16 THE WITNESS: I know of no other solution.

17 MR. GROSSMAN: So reversion is the appropriate
18 one.

19 THE WITNESS: This is, this, and I think it's the
20 appropriate. I think it's the appropriate.

21 MR. GROSSMAN: All right. Thank you.

22 MR. KLINE: As I said, that completes our
23 presentation but I'd like to just kind of make a couple of
24 comments throwing it all together. Unusual, isn't it?
25 Interesting and unusual. And it's probably fun for you to

1 see a case come back to you, because normally when a zoning
2 case leaves your office, you don't know what happens.

3 MR. GROSSMAN: I prefer if they stay away.

4 MR. KLINE: What I want to say is in the
5 prehearing submission some of the phraseology we've used
6 today, I used the term impossibility of performance because
7 as you point out, the two covenants conflict and you can't
8 do one without having reconciling it with the other one.
9 The honest answer to the question though, there is another
10 route to go. The Zoning Ordinance does allow you to build
11 single family houses in the RT-12.5 zone. It says, however,
12 subject to the R-60 zone standards. The reason we think
13 it's a practical impossibility and partly in the context of
14 why I asked Mr. Becker and Mr. Berman to explain the
15 difficulty of marketing the property with this cloud over
16 it.

17 To do that we would have to go back and amend the
18 schematic development plan to essentially just the lots that
19 we have, the 10 lots that we have available. So we'd have
20 to reconcile that. You could come up with new binding
21 elements. But, you could come up with a schematic
22 development plan consistent with a platted pattern on the
23 property and say this is our schematic development plan.
24 But then that will also, and you have the process and the
25 cost of that is what I'm leading up to.

1 But then, because you're in a zone that requires
2 site plan, you have to go through the site plan review
3 process, which for 10 single family houses it would normally
4 occur as a matter of right is kind of an unusual process.
5 And then in the end you still end up with a piece of
6 property that's zoned RT-12.5 that most of the traditional,
7 conventional development industry just still has trouble
8 saying how, why am I building single family houses on
9 townhouse zoned land, and Mr. Berman was reminding me today
10 about that R-60 qualification, if you develop in the RT-12.5
11 I can just see when we went to Park and Planning some, well,
12 but you're, how do you apply the R-60 zone standards in a
13 RT-12.5 through the site plan route. I just see some issues
14 associated with that.

15 So because of the timing, the length of time it
16 takes to go through the schematic development plan, even if
17 it could be done or without skipping the public hearing, but
18 you're talking probably an order of six to eight months to
19 go through those two processes together plus the costs, and
20 plus what these gentlemen have said here or alluded to today
21 is, that any buyer is still going to discount that price not
22 only for the cost and delay of those processes, but still
23 that kind of question mark of yeah, but I'm still in an RT-
24 12.5 land it's just still a little unusual.

25 MR. GROSSMAN: In view of what you said, Mr.

1 Berman, can you resume the stand here for a second. You
2 heard what Mr. Kline just summarized, in essence saying
3 there is another possible legal way to handle this but it's
4 not practical, if I could summarize it that way and would
5 end up being much, much more costly and still doesn't
6 eliminate the issue of attractiveness to developers. Is
7 that a fair summary in your mind of the situation?

8 MR. BERMAN: Yes, absolutely. I don't know of a
9 bank, well, let's put it this way, I think of the home buyer
10 taking his potential purchase of a lot, sending that to the
11 title company, sending it to the bank, and I just think that
12 that potential of confusion, whether they will understand
13 it, the banks, they potentially might, but a builder would
14 look at that and go, I can't live with that kind of
15 potential. I worked real hard to get a settlement and at
16 the end the bank could turn that down, the zoning thing, the
17 single family, there's potential conflicts.

18 MR. GROSSMAN: So, in other words, you're saying
19 that it creates these other issues because if you still have
20 a RT zone there, even though you can legally build single
21 family homes, assuming you amended the SDP and the
22 covenants, you still have other issues which put a cloud or
23 will make it more difficult to develop the property in a way
24 that is not a viable solution?

25 MR. BERMAN: Well let's say they bought the house

1 and --

2 MR. GROSSMAN: Is that fair to say?

3 MR. BERMAN: That's correct. Let's say they buy
4 the house and then they want to put a porch in the back, do
5 they then have to go through a site plan amendment? I don't
6 know. That's the kind of difficulty that I could foresee
7 even if the initial house gets built, they want to build an
8 addition.

9 MR. GROSSMAN: I'm glad you raised this other
10 point because I think it's a legitimate question, that it
11 legally can be done, and I think we have to at least say to
12 the council that's another possibility, if they decide to do
13 that, although it may not be the ideal one.

14 MR. KLINE: And then my closing phrase is it's in
15 the public interest to have the property revert to it's
16 original R-60 zoning because it's the cleanest process. We
17 have used that legal, it's the cleanest process, and it
18 eliminates the discounting that the Foundation will have to
19 face if we went the other route of retaining the RT-12.5 but
20 building single families, and that frustrates the
21 Foundation's goal of trying to maximize the yield of the
22 property to underwrite the college's operations and that's
23 the public benefit would get of going through the reversion
24 process.

25 MR. GROSSMAN: Well, let me ask you this, what

1 happens now? We have covenants that are in the land
2 records, not just the private ones, but I mean the ones that
3 were filed as part of the rezoning. Is there some new
4 document that needs to be filed in the land records that
5 evidences the reversion back to the R-60 zone and the
6 voiding of those covenants?

7 MR. KLINE: Well, the process, which is in 59-
8 H.2.5, doesn't say that's necessary, but I wouldn't disagree
9 that some title company might bring it up as an issue and
10 that we might have to take the council's resolution on the
11 reversion and record that in the land records to show it
12 essentially supercedes the earlier covenant. But the
13 ordinance doesn't require it.

14 MR. GROSSMAN: No, I know the ordinance says, I
15 just wonder well maybe that's the answer may be the
16 resolution, maybe the resolution needs to be filed. It's
17 not something that, I'm trying to frame in my mind what I
18 recommend to the council and the question is does the
19 council have to execute some kind of additional document or
20 approve some kind of additional document, but I suppose not.
21 A resolution by the council saying it voids the covenants
22 and maybe it should have that kind of language.

23 MR. KLINE: Yeah, it would revert the zoning, and
24 I hadn't thought of it, it voids the covenants and we would
25 probably for belts and suspenders would then record that in

1 the land records.

2 MR. GROSSMAN: All right.

3 MR. KLINE: That does conclude our presentation,
4 Mr. Grossman.

5 MR. GROSSMAN: All right.

6 MR. KLINE: Hope you found it interesting.

7 MR. GROSSMAN: Yes, different anyway.

8 MR. KLINE: When time permits I'll give you the
9 background of why I happen to know the provisions in the
10 ordinance.

11 MR. GROSSMAN: All right.

12 MR. KLINE: If you could leave the record open to,
13 well, I'm sure you're going to leave it open for 10 days.

14 MR. GROSSMAN: I'll leave it open for 10 days, is
15 that enough time for you? I could leave it open for longer
16 if you need it.

17 MR. KLINE: I was going to say, I can have the
18 covenant here this afternoon, and certainly by Monday. We
19 just have to go back in our old file and find it. But if
20 you're leaving it open for 10 days to get the transcript
21 then I'll have it well within that time period.

22 MR. GROSSMAN: All right, then if there's no
23 objection, I would admit into evidence all of the exhibits,
24 that's 1 through 24 and their subparts.

25 MR. KLINE: No objection, Mr. Grossman.

1 MR. GROSSMAN: All right, and when you file the
2 additional exhibits, you've already filed one of the ones we
3 talked about, the Kaz release, but a copy of the private
4 covenants that would become exhibit 25, I suppose, in any
5 event that will be admitted as well. So the record will
6 close then, unless there's any objection, on June 27, 2011
7 following the receipt of that additional document, the
8 private covenants, and the transcript.

9 MR. KLINE: Thank you very much.

10 (Whereupon, at 10:34 a.m., the hearing was
11 concluded.)

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% Digitally signed by Keena Lukacinsky

ELECTRONIC CERTIFICATE

DEPOSITION SERVICES, INC., hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings before the Office of Zoning and Administrative Hearings for Montgomery County in the matter of:

Show Cause Hearing

Kaz Development LLC, Case No. G-858-SC

By:

A handwritten signature in black ink, appearing to read 'KL', written over a horizontal line.

Keena Lukacinsky, Transcriber